

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 26, 2014 Session

IN THE MATTER OF: SHAYLA H.

**Appeal from the Juvenile Court for Davidson County
No. 2003001714, PT81584 Alan Edward Calhoun, Judge**

No. M2013-00567-COA-R3-JV - Filed June 9, 2014

Mother and Father were divorced and Mother was designated as the primary residential parent of their child in 2003. Father filed a petition several years later seeking to have the designation of primary residential parent changed from Mother to himself. The trial court granted Father's petition after determining Father had proved a material change in circumstances and it was in the child's best interest for Father to become the primary residential parent. Mother appealed, and we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

DON R. ASH, SR. J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Lorraine Wade, Nashville, Tennessee, for the appellant, Charlotte M.

Nicholas William Utter, Nashville, Tennessee, for the appellee, Damon H.

OPINION

I. BACKGROUND

Damon H. ("Father") and Charlotte M. ("Mother") were married briefly and are the parents of one child named Shayla. Father and Mother were divorced and Mother was designated the primary residential parent in 2003, after Shayla was born. The trial court entered several orders in 2007 and 2008 upon various motions the parents filed, including motions for contempt and requests for restraining orders against the other parent.

Mother was granted sole decision making authority over educational decisions pursuant to an order dated March 7, 2008, and the parties were given joint decision making authority

with regard to medical treatment. The parties were made equally responsible for Shayla's uncovered medical and dental expenses. The court wrote, "[T]he party who incurs the bill shall forward a copy of the actual bill reflecting the other party's 1/2 amount owed within ten (10) days of the bill being incurred and the other party shall reimburse the party who incurred the bill within thirty (30) days." In an order dated May 1, 2008, the trial court granted Father phone visitation with Shayla every Monday and Wednesday. Mother was directed to have Shayla contact Father between the hours of 7:00 and 8:30 on those evenings.

In September 2010, Father filed a petition to change the designation of Shayla's primary residential parent from Mother to himself. The grounds Father asserted included Mother's failure to attend to Shayla's medical needs; Mother's failure to attend to Shayla's need for speech therapy; and Mother's denial of Father's right to phone visitation and parenting time with Shayla. A magistrate of the juvenile court initially denied Father's petition. Father then appealed the magistrate's decision to a judge of the juvenile court (hereinafter referred to as "the trial court" or "the court"), which granted Father's petition.

II. TRIAL COURT PROCEEDINGS

The trial court held two different hearings to consider whether (1) Father could prove a material change of circumstances had occurred and (2) it would be in Shayla's best interest to designate Father as her primary residential parent. Following the first hearing in October 2011, the trial court made the following findings of fact:

- 1) Father has been proactive in addressing the child's need for speech therapy;
...
- 3) Father took the child to a doctor for severe breathing issues. Mother was notified and believed these problems to be caused by allergies;
- 4) Father provided Mother with a medical packet indicating a serious problem with the child's adenoids indicated surgery;
- 5) Mother made no response for two or three months;
- 6) Father had the surgery done while child was with him. Mother was notified the morning of the surgery; . . .
- 9) Child has experienced some emotional stress as a result of her speech problem which was not addressed until Father put child in speech therapy;

- 10) There have been ongoing problems with Father receiving his court ordered phone calls. On two occasions Mother petitioned the Court to stop the calls and was denied;
- 11) Father was denied visitation with child on child's birthday for two years;
...
- 14) Father would like for child to participate in extra-curricular activities and has offered to pay for those activities;
- 15) Mother agrees this is a good idea but has to date failed to allow child to participate;
- 16) Father seeks reimbursement for half his out of pocket medical bills; . . .
- 19) Mother acknowledged she never contacted the doctor after receiving the paperwork;
- 20) Mother denies it is her voice in recorded phone conversation. (This phone conversation very disturbing and is clearly Mother's voice.)

After reciting its findings of fact, the trial court determined "there has been a material change in circumstances in that Mother has not followed up on the child's medical condition and did not address the issues, emotional and behavioral, associated with the child's speech problems." The court postponed conducting a best interest analysis until the end of the school year, in June. The court explained, "Any change of custody would occur, if necessary, at that time. Specifically, the Court will review the Mother's ability to follow court orders and to act in the best interest of the child. In making a disposition at that time, the Court will also assess the mother's ability and willingness to encourage and promote a positive relationship between the child and her father."

The trial court then held a dispositional hearing on June 8, 2012, to determine whether it was in Shayla's best interest to change the residential parent designation to Father from Mother. Following the hearing, the court made the following findings of fact, *inter alia*:

1. Both parents love this child and have strong emotional ties with the child;
2. While Mother has been primary caretaker for the child, Father has maintained a constant presence in the child's life. At present, the parents have joint custody with Mother being the primary custodial parent. Both parents are

capable of providing food, clothing, and shelter for the child. However, Mother has been less likely to respond to medical needs of the child, including the child's need for speech therapy;

3. Since the child currently spends significant time with her Father, the child is stable and well-adjusted in both family environments;

4. Both family units are relatively stable;

5. The mental and physical health of both parents is satisfactory. However, Mother's credibility is of concern to the court. Specifically she has frequently misrepresented situations to the court, the most recent being her denial that it was her voice on a recorded phone conversation that could only be described as a "rant," when clearly she was the ranting party;

6. The home, school, and community record of the child is satisfactory while the child has been in Mother's care. This is an unknown as to Father. However, Father has supported and been a part of the child's education to the extent possible while child has lived with Mother as primary caretaker. The Father was proactive in initiating speech therapy for the minor child at Vanderbilt in 2010. Prior to the child receiving speech therapy her participation in the classroom was affected as well as her grades due to her unwillingness to participate as she was embarrassed when she answered aloud. Further, the Father has attended and actively participated in all Individualized Education Program (I.E.P.) meetings;

7. The child has not expressed a preference as she is not twelve years of age;

8. The child has, in the opinion of the court, experienced emotional abuse in the form of significant displays of temper (screaming, loud arguments, cursing, etc.) at exchanges and when the child overhears inappropriate phone conversations;

9. Neither parent has an inappropriate person residing in the home. . . ;

10. Both parents are capable of performing parental responsibilities. However, Mother has consistently done all in her power to disrupt Father's contact with the child. She has repeatedly sought to cut off phone contact with Father and has "misunderstood" numerous orders related to visitation, the most recent being Father's time with the child on her birthday. Mother is an intelligent and

articulate woman, and is more than capable of interpreting a court order. Evidence overwhelmingly shows the Mother's unwillingness to facilitate and encourage the child's relationship with her Father. The Mother refuses to comply with the court's orders. The Mother has a pattern of denying the Father phone calls with the minor child. The Mother has filed pleadings with this court in an attempt to terminate the Father's phone calls. The Mother refused to allow the Father to exercise parenting time on the minor child's birthday in 2009 and 2010 and on the Father's birthday in 2011 contrary to court orders. The Mother refused to allow the minor child to participate in extracurricular activities simply because activities were the Father's idea;

11. Father expresses a willingness to work with Mother and to support her relationship with the child. . . .

Then, based on its findings of fact, the trial court made the following conclusions of law:

1. There has been a substantial and material change of circumstances and that it is in the best interest of the minor child . . . for the Father, Damon [H.], to be designated the primary residential parent.
2. The Father shall have sole decision making on the health and education of the minor child
3. The Mother owes the Father \$547.79 for her one-half (1/2) share of the uncovered medical expenses through December 27, 2010, which were paid by the Father, copies provided to the Mother but of which Father was not reimbursed.
4. The Mother owes \$1,014.24 directly to the medical providers for her one-half (1/2) of the uncovered medical expenses through December 2010. Copies of these unpaid medicals were provided to the Mother
5. The Mother was previously found to be a less credible witness in prior hearing and this court finds the Mother not to have been a credible witness during the hearing on October 28, 2011, and during the dispositional hearing on June 8, 2012.

Mother filed a motion seeking a new trial and to alter and amend the judgment, which was denied. The trial court ruled it "had a legal basis for designating the Father Primary

Residential Parent.” Mother then filed a Notice of Appeal with the Court of Appeals. On appeal, Mother argues the evidence did not support the trial court’s determination (1) a material change of circumstances had occurred and (2) it was in Shayla’s best interest for Father to be named the primary residential parent. Mother also contends the trial court erred when it concluded Mother owed Father \$1,024 for unpaid out of pocket medical expenses.

III. ANALYSIS

A. Standard of Review

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the trial court’s findings of fact, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013); *Rigsby v. Edmonds*, 395 S.W.3d 728, 734 (Tenn. Ct. App. 2012). We review a trial court’s conclusions of law *de novo*, according them no presumption of correctness. *Armbrister*, 414 S.W.3d at 692; *Rigsby*, 395 S.W.3d at 734. A trial court’s determinations of whether a material change of circumstances has occurred and where the best interest of a child lie are factual issues. *Armbrister*, 414 S.W.3d at 692-93; *In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007). Appellate courts must, therefore, presume a trial court’s factual findings on these matters are correct and not overturn them unless the evidence preponderates to the contrary. *Armbrister*, 414 S.W.3d at 693. In weighing the preponderance of the evidence, the trial court’s findings of fact that are based on witness credibility are given great weight, and they will not be overturned absent clear and convincing evidence to the contrary. *In Re: Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2002).

As our Supreme Court has explained,

Because decisions regarding parenting arrangements are factually driven and require careful consideration of numerous factors, *Holloway v. Bradley*, 230 S.W.2d 1003, 1006 (1950); *Brumit v. Brumit*, 948 S.W.2d 739, 740 (Tenn. Ct. App. 1997), trial judges, who have the opportunity to observe the witnesses and make credibility determinations, are better positioned to evaluate the facts than appellate judges. *Massey-Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007).

Armbrister, 414 S.W.3d at 693.

The Court of Appeals has noted trial courts have broad discretion in determining which parent should be the primary residential parent and appellate courts are reluctant to second-guess a trial court’s decision on this issue when so much depends on the trial court’s

assessment of the witnesses' credibility. *Reinagel v. Reinagel*, 2010 WL 2867129, at *4 (Tenn. Ct. App. July 21, 2010); *Scofield v. Scofield*, 2007 WL 624351, at *2 (Tenn. Ct. App. Feb. 28, 2007). The Court of Appeals will reverse or modify a trial court's custody decision, however, if it determines the decision is based on an error of law, the evidence preponderates against the finding there has or has not been a material change of circumstances, or if the child's interests will be best served by a different custody arrangement. *Steen v. Steen*, 61 S.W.3d 324, 328 (Tenn. Ct. App. 2001); *Placencia v. Placencia*, 3 S.W.3d 497, 499 (Tenn. Ct. App. 1999); *Scofield*, 2007 WL 624351, at *2.

B. Material Change of Circumstances

In his petition, Father sought to have the primary residential parent changed from Mother to himself. Modification of a court's prior order with regard to which parent is designated the primary residential parent is governed by statute:

If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

Tenn. Code Ann. § 36-6-101(a)(2)(B).

A petition to modify the custody of a child requires the court to conduct a two-step analysis. "The threshold question is whether a material change in circumstances has occurred since the entry of the prior [custody] order." *Boyer v. Heimermann*, 238 S.W.3d 249, 259 (Tenn. Ct. App. 2007). Only if the court finds a material change in circumstances does it proceed to consider whether changing custody is in the child's best interest. *Id.*

Decisions involving the custody of a child are among the most important decisions faced by the courts. *Steen*, 61 S.W.3d at 327. The party seeking modification of the parenting plan to change the designation of the primary residential parent has the burden of proving a material change in circumstances. *Taylor v. McKinnie*, 2008 WL 2971767, at *3 (Tenn. Ct. App. Aug. 5, 2008) (citing *Kendrick v. Shoemaker*, 90 S.W.3d 566, 570 (Tenn. 2002)). The Supreme Court has explained "[t]here are no hard and fast rules" in determining whether such a material change in circumstances has occurred:

Although there are no bright-line rules for determining when such a change has

occurred, there are several relevant considerations: (1) whether a change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child's well-being in a meaningful way.

Cranston v. Combs, 106 S.W.3d 641, 644 (Tenn. 2003); *see Kendrick*, 90 S.W.3d at 570 (same); *see Boyer*, 238 S.W.3d at 255-257 (discussion of evolution of the standard for finding a material change in circumstances); *see also Armbrister*, 414 S.W.3d at 701-04 (discussion of difference required to prove material change in circumstances for modification of custody versus modification in parenting schedule).

In this case, the material change in circumstances Father alleged included Mother's failure to address Shayla's need both for medical attention and for speech therapy. The record contained evidence, in late 2009 and early 2010, Father noticed Shayla was having difficulty breathing at night and she was having difficulty saying certain sounds. When Mother was made aware of Father's concerns during the year 2010, Mother responded she did not have time to deal with these issues and Father would have to take care of what Father perceived to be Shayla's medical and speech problems.

Evidence was introduced, in 2010, Father brought Shayla in to see a physician to address her breathing problems at night. The physician examined Shayla and prepared a packet of information to send to Mother about Shayla's condition and need for surgery to remove her enlarged adenoids. Mother acknowledged receiving the packet, but she did not follow up by contacting either Father or the physician to find out more about the doctor's recommendation.

The record contains notes from Shayla's physician. These notes indicate Father asked the physician to contact Mother to discuss Shayla's condition and the physician attempted to reach Mother. The physician stated in his notes he left a message with Mother, asking her to return his call. According to the physician, Mother never returned his call. Father arranged to have the recommended surgery performed on Shayla in July 2010. Father testified the surgery was successful and Shayla's breathing problems at night ceased following the surgery.

We turn now to Shayla's need for speech therapy. The record contains evidence Shayla was difficult to understand in class due to her inability to make certain sounds and, as a result, Shayla did not like to talk in front of her friends or volunteer to speak in class. Father testified he was alarmed at the negative effects on Shayla from not being able to speak properly and in 2010 he decided to set up a speech evaluation in an effort to improve his

daughter's quality of life even if Mother refused to participate in this effort. As a result of the speech therapy she received over several months' time, the evidence was undisputed Shayla has become better adjusted socially and her speech is much improved.

In her brief, Mother asserts Father has failed to show there was a material change of circumstances since January 10, 2008, when the parties were last in court to address custody issues. Mother contends Shayla has suffered sinus problems for years, and there was no evidence of any problem had arisen since January 2008. We note, however, evidence was presented Shayla was experiencing difficulty breathing at night prior to late 2009 or early 2010, when Father became alarmed at what he perceived as Shayla's labored breathing at night. Mother continues, writing the following in her brief:

The evidence does not point to the fact that the Mother failed to address the child's medical needs. What the evidence does point to is that the Father manipulated the doctor and disregarded the court's orders in regards to joint decision making for medical care for the child and ordered the surgery on his own without consulting with Mother.

We disagree with Mother's characterization of the evidence and find Mother to be disingenuous. As pointed out above, Father arranged for a packet of medical information to be sent to Mother regarding the proposed surgery; Father asked the physician to contact Mother to discuss the surgery; and the physician attempted, without success, to reach Mother by phone. Despite Mother's pretension she was not informed about Shayla's medical condition and her need for surgery before the surgery was scheduled, there is strong evidence to the contrary.

Mother also contends there was no evidence Shayla was experiencing emotional or behavioral issues as the result of her speech problems. Mother relies for this argument on the speech pathologist's notes Shayla was a delightful child who interacted well with the examiner. Mother seems to ignore the school records from 2010-11 were introduced into evidence, however, indicating Shayla was experiencing speech issues, she had difficulty staying "on task," and she was experiencing problems with self-control.

Based upon our review of the record, we find the evidence does not preponderate against the trial court's findings Father has established a material change of circumstances by a preponderance of the evidence. We also find the material change of circumstances has occurred since the entry of the prior court order regarding custody, which Mother contends is 2008.

C. Best Interest Analysis

After finding a material change in circumstances has occurred, the trial court must determine whether modification of custody is in the child's best interest using the factors enumerated in Tennessee Code Annotated § 36-6-106. These factors include, but are not limited to, the following:

- (1) The love, affection and emotional ties existing between the parents or caregivers and the child;
- (2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver;
- (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment . . . ;
- (4) The stability of the family unit of the parents or caregivers;
- (5) The mental and physical health of the parents or caregivers. . . . ;
- (6) The home, school and community record of the child;
- (7)(A) The reasonable preference of the child, if twelve (12) years of age or older;
- (B) The court may hear the preference of a younger child on request. The preferences of older children should normally be given greater weight than those of younger children;
- (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person . . . ;
- (9) The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person's interactions with the child; and
- (10) Each parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing

parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child. In determining the willingness of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order.

In conducting the best interest analysis, the trial court noted Mother and Father both love Shayla and are able to provide Shayla with the necessities of food, clothing, and shelter. The court also considered the fact the Mother has been "less likely to respond to medical needs of the child, including the child's need for speech therapy." Moreover, in considering the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, the court noted Mother's refusal to follow prior court orders entitling Father to have phone visitation with Shayla as well as Mother's refusal to let Father spend time with Shayla on her birthday each year. Finally, the court found Mother's credibility to be "of concern to the court."

Mother contends the court's earlier orders are inconsistent about whether Father is entitled to phone visitation with Shayla twice each week or whether Father is entitled to this visitation only when Shayla is with Mother for an entire week. Although there are two orders in the record regarding Father's right to phone visitation, the latter order is clearly the operative order, as it states on its face is based on Father's appeal of the earlier order awarding Father less phone visitation.

Mother is correct the record does not contain an order entitling Father to spend time with Shayla on her birthday.¹ However, both Father and the trial court refer to a previous order awarding Father time with Shayla on her birthday, and we have no reason to doubt the existence of this order. In any event, our conclusion on this issue does not rest on whether or not Mother violated an order permitting Father to spend time with Shayla on her birthday. More important is the evidence of Mother's attempts to interfere with Father's time with Child and her failure to foster a close relationship between Father and Shayla.

Our review of the record indicates the evidence does not preponderate against the trial court's findings of fact with respect to its best interest analysis. We agree with the trial court it is in Shayla's best interest for Father to be named the primary residential parent.

¹This may be because some court documents were destroyed in the flood of May 2010, as both parties have represented to this Court.

Accordingly, we affirm the trial court's judgment designating Father the primary residential parent.² As the Supreme Court stated in *Cranston v. Combs*, although both parents are "fit parents," the Father is "comparatively more fit." 106 S.W.3d at 646. Thus, we hold it is in Shayla's best interest for Father to be designated her primary residential parent.

D. Medical Expenses

Mother also appeals the trial court's order she pay Father one-half of Shayla's uncovered medical expenses. As set out above, the court order entered on March 7, 2008, is clear and unequivocal the parties are "equally responsible for any uncovered medical and dental expenses incurred on behalf of the minor child." Mother does not deny she is responsible for paying one-half of uncovered medical expenses. Rather, she contends she should not have to pay anything unless Father can prove he sent Mother proof of these expenses in a "timely fashion."

Father provided oral and documentary evidence at the trial in October 2011 about the amount of Shayla's uncovered medical expenses he had paid as well as the amounts were still owing. Father testified he sent a copy of these bills to Mother, but Mother never acknowledged receiving this information. Mother had the opportunity at trial to question Father about whether he notified Mother of the bills in a timely manner, but she did not do this. Thus, there is no evidence about when, exactly, Father sent these bills to Mother.

Mother and Father are equally responsible for Shayla's uncovered medical expenses, regardless of the date on which Father notified Mother of these expenses. Therefore, we affirm the trial court's order with respect to these expenses. Specifically, we affirm the trial court's order awarding Father a judgment against Mother in the amount of \$547.79, which represents Mother's half of the uncovered medical expenses Father has already paid. We also affirm the trial court's order Mother pay directly to the appropriate medical providers her one-half share of the uncovered medical expenses have not yet been paid, which equals \$1,014.24.

²In addition to her other arguments, Mother contends the trial court "committed reversible error" by soliciting testimony from one of the administrators of Shayla's school outside the presence of the parties. We note the trial court indicated during the hearing on June 8 it intended to have an *ex parte* conversation with this individual. The court asked whether either party objected, and each party stated it had no objection. Then, in response to a motion by Mother, the trial court issued an order stating it did not take notes of any conversation with this third party. The court's ultimate decision does not appear to be based in any way on anything this third party may have said. Thus, we see no need to address this issue Mother raises.

IV. CONCLUSION

For the reasons stated above, we affirm the trial court's judgment in all respects. Costs of this appeal shall be taxed against the appellant, Charlotte M., for which execution shall issue, if necessary.

DON R. ASH, SR. JUDGE